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GSA Office of Governmentwide Policy

MV-15-03 Supplement #1

MEMORANDUM FOR THE ACQUISITION WORKFORCE

FROM: JEFFREY A. KOSES *Jeffrey A. Koses*
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SUBJECT: Further Background and Guidance on Acquisition Letter (AL)
MV-15-03: Class Deviation Addressing Commercial Supplier
Agreement Terms that Conflict or Are Incompatible with Federal Law

1. Purpose. This supplement to AL MV-15-03 provides some answers to questions on negotiating commercial terms with software licenses.
2. Background. Because a federal contract can be long, complex, and made up of many terms and conditions, there is potential for conflict between different terms. The Order of Precedence clause takes care of this problem, by stating which term prevails.

With the class deviation referenced above, GSA changed the order of precedence to state that the terms of the solicitation rank higher than the terms in a software license.

Why? Because software license terms change very frequently. Quite often, the end user has to click accept or check a box to update license terms.

That's not a good way to protect taxpayer dollars. It is important that the Contracting Officer (CO) and the contractor agree up front to the basic terms and conditions of the contract.

The contractor is always free to propose updated terms and conditions, but if the update will affect our rights, then the CO needs to be aware and make a decision.

A large number of updated license terms are not significant to us, and the standard update process is acceptable. The change in the Order of Precedence protects GSA interests in those occasions where the license update could change government rights. Such a change will no longer apply, unless the Contracting Officer specifically accepts them by modification to the contract.

The following chart shows the change in the Order of Precedence. Note that software licenses are grouped with “addenda” for the purpose of the clause.

FAR 52.212-4 (Basic Clause) - paragraph (s)	GSAR 552.212-4 (Alternate II) (FAR Deviation) (July 2015) - paragraph (s)
(1) The schedule of supplies/services	(1) The schedule of supplies/services.
(2) The Assignments, Disputes, Payments, Invoice, Other Compliances, Compliance with Laws Unique to Government Contracts, and Unauthorized Obligations paragraphs of this clause	(2) The Assignments, Disputes, Payments, Invoice, Other Compliances, Compliance with Laws Unique to Government Contracts, Unauthorized Obligations[, and Commercial Supplier Agreements – Unenforceable Clauses] paragraphs of this clause
(3) The clause at 52.212-5	(3) The clause at 52.212-5
(4) Addenda to this solicitation or contract, <u>including any license agreements for computer software</u>	[(4) Solicitation provisions if this is a solicitation]
(5) Solicitation provisions if this is a solicitation	[(5)] Other paragraphs of this clause
(6) Other paragraphs of this clause	[(6)] Addenda to this solicitation or contract, including any license agreements for computer software]
(7) The Standard Form 1449	(7) The Standard Form 1449
(8) Other documents, exhibits, and attachments	(8) Other documents, exhibits, and attachments
(9) The specification	(9) The specification

3. Frequently Asked Questions

- i) Are the terms and conditions of a contractor's proposal and CSA still negotiable under this class deviation?
 - A. Yes. Offerors can submit terms and conditions with their proposal that may require negotiation between the offeror and the GSA. The important point is

that the CO will know and specifically consider any unique terms the contractor proposes.

ii) Can any of the illegal or improper CSA terms identified in Acquisition Letter MV-15-03 be negotiated?

A. No. If you have a specific concern with the manner in which an offeror addresses one of the illegal or improper CSA terms, please consult with your assigned legal counsel.

iii) If we can't negotiate the improper CSA elements identified in the class deviation, what can still be negotiated?

A. Some software licenses are large and complex, running through dozens of items. Others are very simple. Apart from the 15 CSA terms specifically excluded, other terms are subject to negotiation. It is the contractor responsibility to propose such items.

iv) What types of CSA terms should we negotiate?

A. Contracting Officer should pay close attention to terms such as: warranty, price per user, transferability of agreements, maintenance fees, etc.

v) How do I incorporate a CSA into a contract?

A. Use language along the following lines: "The Commercial Supplier Agreements agreed to by [Company A] and dated [Month, Day, Year] for [product X] or [products X] or service (if applicable) is hereby incorporated into contract [AA-XXF-NNNNA]."

Do not incorporate any GSA legal correspondence or documents detailing communications with the Office of General Counsel (OGC) or other legal support into the award documents. File GSA legal correspondence and reviews under the appropriate contract tabs.

vi) How do I handle updates to the CSA?

A. The change to the Order of Precedence clause means that routine CSA updates do not need to be incorporated or addressed into the contract. The contractor will submit a modification proposal if the revised terms or conditions are intended to change government rights or responsibilities.

vii) Does a contractor's negotiated proposal take precedence over a CSA, or do the terms and conditions outlined in the solicitation take precedence over a CSA?

A. Negotiated proposals will take precedence over both CSA terms and the conditions outlined in the solicitation, as they represent the mutually agreed upon terms and conditions.

4. Effective Date. Immediately.
5. Expiration Date. This Acquisition Letter renews AL-MV-15-03 and will expire upon incorporation of the changes into the General Services Administration Acquisition Manual (GSAM) or Federal Acquisition Regulation (FAR).
6. Applicability. This Class Deviation applies to all GSA acquisitions when the resultant contract is for items containing Commercial Supplier Agreements
7. Point of Contact. If you have any questions concerning the topic of this Acquisition Letter, please contact Ms. Janet Fry of the General Services Acquisition Policy Division, (703) 605-3167 or janet.fry@gsa.gov.